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Supreme Court, U.S.
FILED

In The 08-243 JUN 26 2008

Supreme Court of the United States OFFICE OF THE CLERK

No_____

DEBRA L. THOMAS PETITIONER

V.

EVANSVILLE VANDERBURGH

SCHOOL CORPORATION, PAT LOGE,

Et al., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI OF THE UNITED STATES COURT OF THE APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether Court of Appeals overlooked District Court Order on October 13, 2004, that deprived Petitioner of her right for a hearing. Magistrate Judge set a Telephonic Status Conference for Wednesday to determine whether the Plaintiff claim survive this stage. Did District deprive Petitioner of her Federal right under Federal Rules of Civil Procedure Rule 12, 56, 28 U.S.C.

2. If, so, Petitioner was deprived of her right to present contradicting affidavits and material to cure jurisdictional defect and opportunity to cure defect in Petitioner's complaint.

3. Whether Court of Appeals overlooked District Court error for violating the Federal Rules of Civil Procedure Rule 56, and Local Rules 78 and 83, for denying Petitioner of her motion requesting for Oral Argument.

4. If, so, Did Court of Appeals of the Seventh Circuit overlook in opinion case Dredge Corp. v. Penny 338 F2d 456, 1 ALR Fed 281, states revelant in part, that District Court cannot by rule or otherwise, preclude a party from requesting Oral Argument, nor deny such when Made by party opposing a motion for summary judgment. Also see: Fernhoff v. Tahoe Regional Planning Agency (1986, CA9 Nev) 803 F2d 979.

5. Whether Court of Appeals overlooked District Court error of law for depriving Petitioner of her right of

notice and opportunity of the Court's intentions on ruling on summary judgment. Did Court of Appeals overlook District Court Order on November 04, 2004, that Dismiss Petitioner's complaint and granted the Respondents' their motion for summary judgment under Federal Rules of Civil Procedure Rule 56 (e) not for a frivolous complaint.

6. If, so, The Federal Rules of Civil Procedure Rule 12 (b), 56, 28 U.S.C.A. states revelant in part, Unless claim is frivolous, court cannot sua sponte enter summary judgment, or dismiss complaint without notifying parties of its intentions and allowing opportunity to cure defect in complaint or to respond. See: English v. Cowell (1993, CA7 Ill) 10 F3d 434, 144 BNA LRRM 2754, 126 CCH LC 10928, 27 FR Serv 3d 513.

7. Whether Court of Appeals overlooked District Court manifest error, for mishandling or disposing of Petitioners supplemental eighteen additional pages of genuine issue of material fact on August 16, 2004, that had met the requirement under 56 (e). Did District Court error for not ruling on Petitioner's supplemental genuine issues of material fact that was filed stamped by the Clerk of the District Court.

8. If, so Did District Court error for not ruling on Petitioner's supplemental eighteen additional pages of genuine issue of material fact filed and filed stamped on August 16, 2004.

9. Whether District Court overlooked Respondents motion on September 24, 2004 for Order on supplemental material filed by Petitioner. Does Respondents motion provide evidence that District Court had knowledge of Petitioner's supplemental eighteen additional pages of genuine issues of material facts.

10. If, so is District Court error grounds for a manifest error under Federal Rules of Civil Procedure Rule 59 (e).

11. Whether Court of Appeals overlooked the error of the District Court for not ruling on Petitioner's supplemental eighteen pages of material evidence under Federal Rules of Civil Procedure Rule 56, that establishes jurisdictional under 28 U.S.C. 1343 (a)(3) that redressed the deprivation of any rights, privileges, or immunity Secured by the Constitution of the United States.

12. Whether Court of Appeals overlooked District Court denying Petitioner her motion to Compel Discovery on August 18, 2004, the Court's order was denied for stay of future proceedings on September 18, 2004. Did District Court deprive Petitioner of her opportunity to present all material evidence under Federal Rules of Civil Procedure Rule 12.

13. Whether Court of Appeals overlooked District Court error under Federal Rules of Civil Procedure Rule 12 (c), and Rule 12 (b), revelant in part, that

motion for judgment within such time as not to delay the trial all parties shall be given reasonable opportunity to present all material Pertinent to such a motion. Did Court of Appeals overlook Petitioner motions denied by the Court to submit Petitioner's genuine issues of materials fact that was denied by the District Court.

14. Whether Court of Appeals overlooked District Court error for not ruling on the Petitioner's supplemental eighteen genuine issues of material fact submitted on August 16, 2004.

15. Whether District Court should have overlooked Petitioner's mislabeled motion for reconsider granting the defendants' their defendants their motion for summary judgment. Petitioner, pro se, mislabeled her motion but was filed within the ten day limit after judgment. Petitioner's counselor had abandoned her case without notifying Petitioner of his intentions.

16. Whether Court of Appeals overlooked Petitioner Appendix that asserted over two hundred pages of evidence bearing burden of proof showing jurisdictional does in fact follow under Federal Rules of Civil Procedure Rule 12, 56, 28 U.S.C.A.

17. Whether Court of Appeals overlooked the Evansville Vanderburgh School Board of Trustees in their official capacities is the final policy making that adopted revelant in part, two policies that deprived

Petitioner of her 1983 Civil Rights and violated Petitioners Constitutional Rights.

18. Whether Court of Appeals overlooked that the United States Supreme Court characterized 42 U.S.C. 1983 actions as tort actions for purposes of determining an appropriate statute of limitations, the court did not intend that any state statue, apply to "tort actions," would apply to 1983 actions just because they are characterizes as tort action, and therefore failure to file notice as required cannot bar an independent action under 1983. See: Craig v. Witucki,(624 F. Supp. 558 (N.D. Ind. 1986).

19. Whether Court of Appeals overlooked Petitioner entire material evidence of record that asserts over two hundred pages of material evidence that Petitioner filed her complaint on February 13, 2002

PARTIES TO THE PROCEEDING

The Petitioner Debra L. Thomas. The Respondents Evansville Vanderburgh School Corporation, Evansville Vanderburgh Board of Trustees, Pat Loge, Sally Kivett, Jim Trader, Thomas Higgs, and Sharon Turpin.

PETITION FOR WRIT

The Petitioner respectfully petition for a Writ Certiorari to review the judgment of the United States Court of Appeal for the Seventh Circuit

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OPINIONS BELOW

The Court of Appeals unpublished Order. The United States District Court unpublished Order.

JURISDICTION

The Judgment of the Court of Appeals was issued on December 26, 2007, and the Petitioner for Rehearing En Banc was denied on April 02, 2008. This Court has Jurisdiction over this Petitioner under 28 U.S.C. 1254 (1) and Article 111 Section 2.

CONSTITUTIONAL PROVISIONS, STATUES, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law...abridging the freedom of speech.

The Fifth and Fourteenth Due Process Clause provides heightened protection against government interference with certain fundamental right and liberty interest.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law.

INTRODUCTION

The Petitioner Debra L. Thomas is an adult and is a resident of the Vanderburgh County.

Respondent, Evansville Vanderburgh School Corporation is a public school corporation operating in Vanderburgh County, Indiana.

The Evansville Vanderburgh School Corporation Board of Trustees is the final making and is a govern body of the Evansville Vanderburgh School Corporation.

Respondent Pat Loge is a principal with the Evansville Vanderburgh School Corporation.

Respondent Sally kivett is a Special Concern Counselor with the Evansville Vanderburgh School Corporation.

Respondent Thomas Higgs is a Guidance Counselor with the Evansville Vanderburgh School Corporation.

Respondent Jim Trader is the Director of Student Services.

Respondent Sharon Turpin is a teacher with the Evansville Vanderburgh School Corporation.

STATEMENT OF THE CASE

This case is a 1983 Civil Action against the Respondent while acting under color of law while in their individual capacities for depriving Petitioner of her rights, privileges, and immunities secured by the

Constitution of law. The Respondents' while acting under color of law while in their individual capacities under false pretense assassinated Petitioner's Character by reporting fraudulent child abuse to the Child Protection Services that I had abused by child. The Respondents while acting under color of law while in their individual capacities willful misconduct acts of malice caused Petitioner to suffer emotion mental depression and anxiety that had to be under the care of a mental health doctor. Petitioner became fearful that the Respondents while acting under color of law while in their individual capacities fraudulent child abuse reports would cause Petitioner to lose custody of her four children and or be incarcerated. On March 01, 2000, Respondent Pat Loge while acting under color of state law while in her individual capacity made and reported a under false pretense child abuse report to the Child Protection Services that Petitioner threaten to kill her daughter. Respondent Sally Kivett on March 01, 2000, while acting under color of law while in her individual capacity under false pretense made her complaint from Loge School and reported to the Child Protection Services that mother (Petitioner), threaten to murder Marteisha in front of school staff during yesterday conference meeting. Also, Respondent Sally Kivett, special concern counselor while acting under color of state law while in her individual capacity deprived Petitioner's parental rights for counseling Petitioner's daughter for three years every week without Petitioners knowledge or consent.

Respondent Thomas Higgs while acting under color of state law while in his individual capacity on February 22, 2000, under false pretense fabricated a fraudulent child abuse report that had Petitioner investigated by the Child Protection Services. Also, Respondent Thomas Higgs while acting under color of state law deprived Petitioner of her parental rights by filling out two forms (1) Psychological Testing that asked a question revelant in part, was parent contacted. Respondent Thomas Higgs, left the question blank clearly establishing that the Respondent Thomas Higgs while acting under color of law had never contacted parent about the welfare of her child behavior problems at school. (2) Respondent Thomas Higgs Team Brainstorm Session clearly establishes the Petitioner was deprived of her Fifth and Fourteenth Due process clause Constitution of the United States. Revelent in part the document states to list of general education interventions to help goal. Respondent Thomas Higgs put check marks by meet with counselor, social worker, verbal cues, pref seating, teacher helper, did not put a check were it states parent contact. Respondent Thomas Higgs while acting under color of law has violated Petitioner of her Due Process Clause Constitutional of the United States. Respondent Sharon Turpin while acting under color of state law while in her individual capacity on January 03, 2000, under false pretense made and reported a fraudulent child abuse report to the Child protection Services that Petitioner abused her

daughter. Respondent Jim Trader while acting under color of law while in his individual capacity had knowledge that each Respondents child abuse report (DOSS-509) form was fraudulent that was to be faxed to the Department of Student Services were he is the Director. Respondent Jim Trader had knowledge that each respondent's child abuse report were reported and made under false pretense that had forward the information any way to the Child Protection Services. The Respondent Evansville Vanderburgh School Board of Trustees in their Official Capacity while acting under color of law are liable for the willful misconduct acts of each Respondent malice act toward the Petitioner. The Evansville Board of Trustees is the final policy making adopted to policies of law. Revelant in part, adopted (1) Procedure to following when dealing with child abuse (2) duties and responsibilities of a Special Concern Counselor. The Board of Trustees in their official capacity had knowledge of the Respondents while acting under color of state law child abuse report is fraudulent. The Board of Trustees adopted both policies that had deprived Petitioner of her 1983 Civil Rights. The Evansville Vanderburgh School Board of Trustees, the final policy making governed under law that the Government did not give Respondents while acting under color of law while in their individual capacities the power to assassinate Petitioner's Character by making and reporting fraudulent child abuse to the

Child Protection Services that caused the Evansville Police to come to Petitioner house.

STATEMENT OF MATERIAL FACTS IN DISPUTE

The Respondents while acting under color of law while in their individual capacities deprived Petitioner Debra L. Thomas, pro se, of her 42 U.S.C.A. 1983 Civil Rights that protects her rights, privileges, or immunities secured by the Constitution and law, as well as a right that is protected by the Privileges and immunities and equal Protection Clause. The Evansville School Board of Trustees (the final making authority), Respondent Pat Loge, Sally Kivett, Jim Trader, Thomas Higgs, and Sharon Turpin while acting under color of law while in their individual capacities deprived Petition of her 1983 Civil Rights while acting color of law the Respondents violated Petitioner of her Fifth, and Fourteenth Due Process Clause Constitution of the United States. The Evansville Vanderburgh School Board of Trustees the final making authority is liable for the Respondent while acting under color of law while in their individual capacities had knowledge that the Respondents had fabricated handwritten child abuse (DOSS-509) report that had Petitioner investigated under false pretense by third party the Child Protection Services. The Evansville Vanderburgh School Board of Trustees the final policy making adopted the policy revelant in part, states that a teacher, counselor or school employee who suspects or

knows of an incident of sexual abuse, child abuse or child neglect must report the incident to the building principal immediately. Revelant in part, states that after the oral report has been made a report is to be faxed to the Department of Student Services and counseling. The Department of Student Services and Counseling will then report the incident to the Child Protection Services. The signed copy of the abuse and neglect form should be forwarded to the Director of Student Services and Counseling within twenty four hours. On March 01, 2000, Respondents Pat Loge, and Sally Kivett while acting under color of law while in their individual capacity deprived and violated Petitioner of her Federal Constitutional right of the United States, by fabricating a handwritten under false pretense child abuse form that had Petitioner investigated by the Child Protection Services. The Respondent's child abuse form is clear and convincing that the Respondent had knowledge of the law upon the policy of the Evansville Vanderburgh School Corporation Board of Trustees the final policy making the procedure to follow revelant in part, reporting child abuse. On March 01, 2000, Respondent Sally Kivett while acting under color of law while in her individual capacity deprived and violated Petitioner of her 1983 Civil Rights by their willful misconduct under false pretense fabricated fraudulent child abuse report from Lodge School, and never filled out a D0SS-509 form but still had Petitioner investigated by the Child Protection Services.

SUMMARY JUDGMENT STANDARD

The Federal Rules of Civil Procedure provides that if the evidence show" that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," an entry of summary judgment is necessary and appropriate. FED.R. Civ. P. 56 the burden of proof with respect to demonstrating the absence of genuine issues of material fact rests squarely with the movant. If the burden is initially met, the non-movant is then obligated to present affirmative evidence demonstrating the existence of issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). Moreover, a court favor the non-movant. Anderson v. Liberty, Inc. 477 U.S. 242, 256 1986) The Court of Appeals for the Seventh Circuit has noted. "The non-moving party's own affidavit or deposition will constitute affirmative evidence to defeat a summary judgment motion, even if it includes only bare denial ,"Sarsha v. Sears, Roebuck & Co., 3F.3d 1035, 104 (7th Cir. 1993) Moreover, a court favors the non-movant. non-movant's obligations with respect to demonstrating the existence of genuine issues of fact in defeating a motion for summary judgment are not overly onerous. Indeed a summary judgment is warranted only when the proffered evidence could not permit reasonable jury to conclude that the Plaintiff suffered discriminatory treatment. Salinas v. Dent Wizard International, 2000 U.S. Dis. Lexis 5476 (ND.Ill. 2000)(citing Fuka v. Thomson Consumer

Elecs., 82 F 3d 1397, 1402 (7th Cir. 1996). The Petitioner only needed to only show the existence of genuine issues of material fact in order to demonstrate the shortcoming of the defendants' Motion. Consequently, the Petitioner need not prove ultimate success on the merits at this stage in the litigation, only the existence of genuine issues of material fact precluding judgment. Also, Petitioner had submitted eighteen pages of genuine issue of material fact that met the requirement to defeat a summary judgment under Rule 56 (e).

ARGUMENT

A. PETITIONER HAS ALLEGED VIABLE 42 U.S.C. 1983 CLAIM

The Respondents while acting under color of law while in their individual capacities deprived Petitioner of her Fifth and Fourteenth Due Process Clause Amendment Constitution of the United States had reported with knowledge over ten child abuse reports against Petitioner that had Petitioner investigated by third party the Child Protection Services. By Law, had to investigate the report by the school whether it's frivolous or not. The malice acts of the Respondents while acting under color of law while in their individual capacities had assassinated Petitioner character, that has deprived Petitioner of her right to own and operate her own business called "Home Away from Home to rescue under privilege children. The

Respondents while acting under color of law have damaged Petitioner's reputation that Petitioner will never be able to get her license to operate her own business with working with children. The Respondents willful acts of assassinating Petition Character is a injury sustained under 1983. Also, Respondents while acting under color of law violated Petitioner Fifth and Fourteenth Due Process Rights for depriving Petitioner of her parental rights by licensed Respondent Sally Kivett who is a Special Concern Counselor hired by the Evansville Board of Trustees the final policy making that adopted a law for the Duties and Responsibilities for the Special Concern Counselor to follow. Revelant in part, contact parent. Respondent Sally Kivett while acting under color of law, while in her individual capacity was secretly counseling my daughter without my knowledge or consent for three years every week. "The Fifth Amendment Due Process Clause provides heightened protection against government interference with certain fundamental rights and liberty interest. The Supreme Court held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring children" and "to control the education of their own. The Fourteenth Amendment to the United States Constitution provides that "... no state shall "deprive any person of life, liberty, or property without due process law." The United States Supreme Court has long recognized that the Amendment's Due Process Clause, like its Fifth

Amendment counterpart, "guarantees more that fair process." Troxel V. Granville, 530

U.S. 57, 65 (2000)(citing Washington, 521 U.S. at 720; see also Reno v. Flores, 507 U.S. 291, 301-302 (1993). More recently the Supreme Court has recognized the fundamental right of parents to Make their decisions concerning the care, custody, and control of their children. Stanley v. Illinois , 405 U.S. 645, 651 (1972). As the Supreme Court stated in Troxel v. Granvill, 530 U.S. 57, 65-67 (2000), "(i)n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. Thus, Petitioner has adequate standing to bring this cause of action against the Respondents in regards to the manner that the Evansville Vanderburgh School Board of Trustees the final policy making adopted a policy called Special Concerns Counselor Duties and Responsibilities. Respondent Sally Kivett Special Concern Counselor while acting under color of law while in her individual capacity deprived Petitioner of her Due Process Clause of the Fifth and Fourteenth Amendment that protects the fundamental right of parents to make decisions concerning the care, custody, and control of her child. Respondent Sally Kivett while acting under color of law while in her individual capacity had deprived Petitioner of her parental Due Process Clause. Petitioner on February 29, 2000, learn that the

Respondent had been taking Petitioner's child out of class for counseling for three years without Petitioner's knowledge or consent. The Evansville Board of Trustees allowed Respondent Sally Kivett to step outside her boundary. The Evansville Vanderburgh School Corporation/Board of Trustees only had the power to exercise local govern rules of a Special Concern Counselor. The Board of Trustees policy for Special Concern Counselors Duties and Responsibilities revelant in part, states that Counselor is to maintain a record of counseling contacts with assigned icounselees, to maintain a record of home and/parental contacts, to maintain a file of all cases involving absence and truancy, to maintain confidentiality about students and families, to make parental contacts when the school is unable to do so, and to perform other duties assigned or approved by the Director of Student Services and Counseling. Under 42 U.S.C. 1983 local government, municipal corporation, and school boards are "person; subject to liability under 42 USCS 1983 for violating another person's federally rights, and thus are not wholly immune from suit under 1983· statute covering legal as well as natural person; as persons, local governing bodies can be sued directly under 198 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or executes policy statement, ordinance, regulations, or decision officially adopted and promulgated by that bodies officers; local government officials sued in their official

capacities are "persons under 42 U.S.C. 1983- which imposes civil liability on any person who deprives another of his federally protected rights-in those cases in which local government would suable in its own name. Montell v. Department of Social Servs. (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018, 17 BNA FEP Cas 873, 16 CCH EPD 8345. Action for money damages under 42 USCS 1983 would lie against individual members of school board, Endicott v. Van Petten (1971, DC Kan) 330 F Supp 878. Also, Respondent Sally Kivett while acting under color of law violated Petitioner 42 U.S.C. 1985 Rights. Respondent Sally Kivett while acting under color of law while in her individual capacity conspired with Respondent Pat Loge with her report of fraudulent statement to third party the Child Protection Services. Respondents Pat Loge and Sally Kivett while acting under color of law while in their individual capacities conspired to assassinate Petitioner Character, by making and reporting under false pretense child abuse report and statements that don't add up. On March 01, 2000, Respondent Pat Loge, filled out a handwritten Evansville Vanderburgh School Corporation DOSS 509 form and faxed it to the Department of Student Services then reported to the Child Protection Services. Respondent Pat Loge states revelant in part, that mother called school at 7:50a.m. that threaten to kill her daughter that I don't want her any more, I don't like her. Respondent Sally Kivett while acting under color of law while in her

individual capacity, reported and made a fabricated under false pretense child abuse report against Petitioner. Respondent Sally Kivett while acting under color of law reported and made her complaint from Lodge School on March 01, 2000 at 8:40 a.m. Respondent Sally Kivett while acting color of law revelant in part, document from the Indiana Family and Social Services Administration Division of Family and Children Preliminary Report of Alleged Child Abuse an Neglect. State Form 114(R5/11-98) FPP0310, Allegation Narrative: Sally Kivett, Special Concern Counselor, called regarding concerns of this family. Yesterday there was a conference with school staff and mother, Debra Thomas, Debra threaten to murder Marteisha and stated she can pack her bags and leave. She do not want her home. As stated before, the Evansville Vanderburgh School Board of Trustees the final policy making adopted a policy of law Procedure to follow revelant in the case child abuse report. The Board of Trustees in their Official Capacity had knowledge that the Respondents willful misconduct acts of malice deprives ad violate Petitioners Federal Constitutional Right. The Respondent Sally Kivett while acting under color of law never filled out a Evansville Vanderburgh School Corporation D0SS-509 form to be faxed to the Department of Student Services. Respondent Pat Loge and Sally Kivett while acting under color of law while in their individual capacities made their fraudulent report on March 01, 2000, revelant in part,

that Petitioner called school and stated I threaten to kill my daughter. Respondent Sally Kivett while acting under color of law while in her individual capacity conspired with Respondent Pat Loge made her fraudulent under false pretense report against petitioner stated revelant in part, that I threaten to murder my daughter in front of school staff during a conference meeting. The Respondents while acting under color of law while in their individual capacities deprived Petitioner of her Federal Constitutional Right by assassinating Petitioner Character by making malice under false pretense fabricated child abuse report and made statements to third party the Child Protection Services that had Petitioner investigated under false pretense that clearly violates the Petitioner's Federal Constitutional rights. (The Board of Trustees revelant in part, states a teacher, counselor or school employee who suspects or knows of an incident of sexual abuse, child abuse or child neglect must report the incident to the building principal immediately. After the Oral Report has been made, Please fax your report to the Department of Student services. A signed copy of the School Abuse and neglect form DOSS-509 should be forwarded to the Director of Student Services and Counseling within twenty four hours.

B. DEFENDANTS' CONDUCT WAS A CLEAR VIOLATON OF PETITIONER'S CONSTITUTIONAL RIGHTS

The Evansville Vanderburgh School Corporation/ Board of Education wanting to exercise the power must do so in that manner as a minimum requirement. The Respondents' failed to comply with the law of the State Legislature. The State never gave the EVSC/Board of Education the power of the Guidance Counselor to have Qualified Immunity. The power of a Special Concern Counselor is the power that the Evansville Vanderburgh School Corporation/Evansville Board of Education Duties and Responsibility of a Special Concern Counselor. Alexander Roman, et al., v. Marjorie APPLEBY , et al civ. A. No. 78-3153 United States District Court, E.D. Pennsylvania. Feb. 22, 1983.

C RESPONDENTS MISCONDUCT ACTS WHILE ACTING UNDER COLOR OF LAW OF CAUSED PETITIONER TO SUFFER PERSONAL INJURY

The Respondents while acting under color of law while in their individual capacities cause Petitioner to sustain injuries do their under false pretense fabricated child abuse report to the Child Protection Services. Petitioner became fearful that she could lose custody of her children due to the malice acts the Respondent, The Petitioner suffer emotional mental stress, depression/anxiety.

REASON TO GRANT WRIT CERTIORARI

The Petitioner's supplemental eighteen pages of genuine issue of material fact that had adduce

sufficient evidence for which a jury could conclude that the Respondents indeed deprived Petitioner of her Federal Constitutional Right while acting under color of law while in their individual capacities.

The Court of Appeals of the Seventh Circuit opinion in case Dredge Corp. v Penny 338 F 2d 456, (ALR Fed 281),reversed and remanded, because the District Court could not, by rule or otherwise, preclude a party from requesting oral argument, nor deny such a request when made by party opposing for summary judgment, unless such motion was denied, an the District Court in the case at bar committed reversible error in given effect at bar committed reversible error in given effect to it's rule to preclude oral argument.

Also, See Fernhoff v Tahoe Regional Planning Agency (1986, CA9 Nev) 803 F2d 979. Federal Rules of Civil Procedure 56, n 23 Local rules revelant in part that District Courts are authorized to provide by rules that party desiring oral argument on motion for summary judgment under Rule 56 must apply therefor, in absence of which oral argument will be deemed waived: however, District Court may not by rule or otherwise preclude party from requesting oral argument nor deny such request when made by party opposing motion unless motion is denied.

The District Court error deprived the Petitioner of her Federal Right for trial by jury, under Rule 56 (e) Petitioner provided evidence the court genuine issues

of material fact under Rule 56 (e),that was filed stamped by the Clerk on August 16, 2004.

District Court erred under Rule 12, for denying Petitioner of her Federal Right to present all of her material evidence that asserted material evidence to support Petitioners 1983 Civil Rights complaint action brought pursuant 42 U.S.C. 1983.

Quoting U.S. Supreme Courts Reports (Lawyer Edition) 5 L Ed. 2 Civil Rights 12,5-liability-misuse of power-State Law. 10. Misuse of power, possed by virtue of state law and made possible only because the wrong doers is clothed with the authority of state law, is action taken "under color" of state law, within the meaning of Rev Stat 11 1979 (42 USC 1983), which gives a right of action against a person, who, under color of state law, subjects another to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution.

The Respondents were cloth with authority of state law when they deprived Petitioner of her 1983 Civil Rights, under false pretense fabricated over ten handwritten child abuse report that had Petitioner investigated by third party the Child Protection Service.

The Petitioner has a Federal Constitutional Right to seek relief against the Respondents' while acting under color of law while in their individual capacities with knowledge that their fabricated child abuse report was

fraudulent that deprived Petitioner of her 1983 Civil Rights.

During twenty-two month period from March 2000 through December 2001, Petitioner accumulated 1,812.25 non-paid hours, loss of wages over $28,000.00, Petitioner suffered financially and was forced to file Bankruptcy.

The Government did not give the Respondents' while acting under color of law while in their individual capacities authority to deprive Petitioner of her 1983 Civil Rights and violate Petitioner's Fourteenth Amendment and Petitioner's Fifth and Fourteenth Due Process Clause Constitution of the United States.

Because of District Court manifest error under Rule 59 (e), evidence of record that Petitioner had rendered eighteen pages of genuine issues of material evidence that could have established that genuine issues of material fact exists that was not ruled on by the District Court.

The Respondents while acting under color state law while in their individual capacities fabricated under false pretense Child Abuse Report to the third party the Child Protection Services, has

Deprived Petitioner of her Federal Right of having her own business to operate a business that would give under privilege children a home away from home.

The Respondents while acting under color of law while in their individual capacity as assassinated Petitioner character given the Petitioner the right to sue under 42 U.S.C. 1983 Civil Right.

See Begnaud v. White (1948, CA7 Tenn)170 F2d 323 states revelant in part, Fed. R. Civ. P. Rule 56, that Trial Judge should go slow in passing upon motion for summary judgment where there is reasonable indication that material fact is in dispute. District Court erred for not reviewing entire record that Petitioner had indeed provided the Court with eighteen pages of genuine issue of material fact of evidence that met the requirement under Rule 56 (e).

See Brokaw v. Mercer County 235 F 3d 1000, 1022-1023 (7th Cir. 2000), Id. Citing Rakovich v. Wade, 850 F. 2d 1180, 1209, (7th Cir. 1988). Id Citing Burgess v. Lowery, 201, F. 3d 942, 945, (7th Cir. 2000), See e.g; K.H. Through Murphy v. Morgan, 914, F 2d 846, 851 (7th Cir. 1990).

See: Cf. Morris v. Dearborne, 181 F 3d 657, 668 (5th Cir. 1999). (It is beyond purview that any rational teach could believe that governmental destruction of a family base on fabricated evidence is constitutionally allowed."); Id. At 672 (making knowingly false statements of child neglect violates clearly established constitutional right to familial relations).

See: Roman, et al, v. Appleby, et al., 558 F. Supp. 449 (E.D. Penn., 1983), a similar situation arose in which

parents claimed a violation of the right "to maintain a private family relationship without unnecessary, unreasonable, and capricious governmental

interference and control." Id at 454. The difference in this matter is Respondent Sally Kivett while acting under color of law while in her individual capacity does not have the right of State Law of the Legislature.

Respondent Sally Kivett is a licensed Social Worker not a guidance counselor. Respondent Sally Kivett was hired by the Evansville Vanderburgh School Corporation Board of Trustees, the final policy making adopted a law of Responsibilities and Duties to follow, the Respondents while acting under color of law beyond her boundaries befriended Petitioner's daughter with secret counseling session for three years every week without Petitioner knowledge or consent. Which violate Petitioner of her Fifth and Fourteenth Due Process Clause.

The Evansville Board of Trustees in their Official Capacity the final policy making are liable for the Respondents willful misconduct acts that deprived Petitioner of her Federal Constitutional Rights while acting under color of law while in their individual capacities.

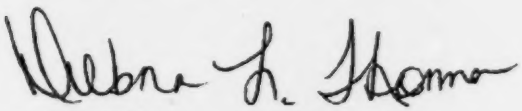
The Court of Appeals erred in his order on December 26, 2007. Sally Kivett on March 01, 2000, indeed made a complaint to CPS that revelant in part, mother threaten to murder Marteisha in front of school staff

during the conference. See Petitioner (Appendix to the 7th Cir).

CONCLUSION

For the foregoing reasons, Debra L. Thomas respectfully request this Supreme Court grant Petition Writ Certiorari review of this matter.

Respectfully Submitted,



DEBRA L. THOMAS

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APPENDIX (A)

DISTRICT COURT ORDER ON NOVEMBER 04, 2004

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

EVANSVILLE DIVISION

DEBRA L. THOMAS, EV02-24-C M/H

Plaintiff

Vs.

EVANSVILLE VANDERBURGH SCHOOL CORPORATION, et al.,

Defendants,

ORDER

This matter is before the Court on various motions relating to Defendant' motion for summary judgment. The Court has granted Defendants' motion for summary judgment; these ancillary motions are resolved as follows: The Court DENIES Defendants' motion to strike. It is unnecessary for the Court to

strike much of the material referred to in Defendants' motion. Rule 56 (e) of the Federal Rules of Civil Procedure require the plaintiff, Debra L. Thomas ("Thomas"), produce evidence to support her claims, and that such evidence "shall produce evidence to support her claims, and that such evidence "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The Court has not considered any evidence Thomas submitted that did not meet the requirement of Rule 56 (e), as is evident from the text of the Court's order granting summary judgment. Also evident from the Courts' order is that the Court need not consider much of the evidence Defendants' move to strike, because the Court did not resolve Thomas' state court claims on the merits. Further, the Court will not strike the affidavit of Marteisha Mosley. In her May 1, 2004, affidavit Marteisha state that she did not report abuse to the people and on the dates indicated in each of the EVSC child abuse and Neglect Forms, which Defendants submitted in support of their summary judgment. Affidavit of Marteisha Mosley 4-5, 7-12. Defendants ask the Court to conclude that Thomas drafted Marteisha's affidavit and that Marteisha had no choice but to sign the affidavit. Mot. To Strike at 3. The Court has no evidence upon which to make such a conclusion. This Court cannot, on a motion for summary judgment, make credibility determinations.

See Payne v. Pauley, 337 F. 3d 767, 770, (7th Cir. 2003). Even assuming Thomas drafted Marteisha's affidavit, the Court cannot presume the statements are unreasonable. A "self serving" affidavit can demonstrate dispute issues of material fact, and although the Court need not vouch for the truth of Marteisha's statements, it must accept Thomas' version of the facts for the purposes of summary judgment. See id. At 773. Defendants' motion to strike the affidavit is denied. The Court DENIES Thomas' request for oral argument. The Court STRIKES as MOOT defendant' request or an order regarding 'Thomas supplemental material. The Court granted Thomas permission to supplement, pro se, her opposition to Defendants; motion for summary judgment, and the Court considered that 10-page supplement in its decision. The Court has no record of Thomas filing an additional 18-page supplement.

IT IS HEREBY ORDERED this 4 day of November, 2004

LARRY J. MCKINNEY, CHIEF JUDGE

United States District Court

Southern District of Indiana

APPENDIX (B)

DISTRICT COURT FINAL ORDER ON APRIL 19, 2007

Entry Concerning Selected Matters

This Court, having considered the above-action and the matters which are pending, makes the following rulings.

1. The defendants' motion to dismiss their counterclaim is granted.

2. The plaintiff's motion to re-open the action is denied as unnecessary because the action was re-opened on February 26, 2007, as this court had directed.

3. The plaintiff's remaining motions filed on March 13, 2007, are denied as moot, because they are directed to the counterclaim, which has now been dismissed.

4. The rulings in this Entry, together with the prior rulings in this case, resolve all claims against all parties, Final judgment consistence with these rulings shall now issue.

IT IS SO OREDERED.

LARRY

MCKINNEY

Date April 19, 2007 CHIEF JUDGE

APPENDIX (C)

UNITED STATES COURT OF APPEALS COURT OF APPEALS (7th Cir.) ORDER ON DECEMBER 26, 2007

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted December 19, 2007

Decided December 26, 2007

Before

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

DEBRA L. THOMAS,
Plaintiff-Apellant,

v.

EVANSVILE VANDERBURGH SCHOOL CORP., et al.,
Defendants-Appellees

Appeal from the United States District Court
Evansville, Indiana
No. 02 C 24
Larry J. McKinney
Chief Judge.

No. 07-2083

ORDER

This appeal concern the measures taken by a public elementary school's teachers, counselor's principal, and nurse in response to a student's claims that her mother was abusing her. The mother, Debra Thomas, seeks relief under 42 U.C.S 1983. Contending that school officials-deprived her of her constitutional rights to equal protection under the law by falsely reporting that she had abused her daughter. Marteisha Mosley. Thomas further contends that, in meeting regularly with Mareisha without Thomas's Knowledge, a school counselor deprived Thomas. After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. The appeal is submitted on the briefs and the record. See FED. R. APP. 34 (a) (2).Of her substantive due process rights to direct the

upbringing of her child. And she argues that school officials have since retaliated against her for complaining about their handling of Marteisha's situation by rejecting her request to enroll her children at the school. The district court granted summary judgment for the school and its official, and Thomas appeals. We affirm.

We recite the facts in the light most favorable to Thomas. Between January 1998 and March 2000, Marteisha was enrolled at Lodge Elementary School in Evansville, Indiana. During that period, members of the school staff-teacher Debra Kascavage, nurse Marilyn Wright, principal Pat Loge, and guidance counselor Thomas Higgs-reported to Child Protective Services (CPS) ten incidents of Thomas's suspected abuse of Marteisha. Eight of the reports related that with an electrical cord, or whipped her with a switch. CPS confirmed that two of those reports were substantiated__ the reports on March 25 and December 8, 1998, both of which included observations of bruised and welts on Marteisha's body. The CPS deemed unsubstantiated the other six reports of physical abuse. Principal Loge filed the two remaining reports__ one in 1998 and the other in 2000. In the first, she reported that Marteisha rode a city bus alone to her babysitter; in he second, she reported that Thomas had called school and threatened to kill her daughter. Those reports also were deemed unsubstantiated. But the CPS, which has a procedure for investigating whether a report is false, did not

initiate that procedure will respect to any of the unsubstantiated reports. At no point did anyone remove Marteisha from Thomas's custody, though the CPS did send police officers to her home in response to Loge's report that Thomas had threatened to kill Marteisha'. During this period, teachers, school (administrators and other personnel frequently would call upon Sally Kivett, a special concerns counselor at school, to take Marteisha out of class and discuss her difficulties functioning and performing at school. It is undisputed that Kivett did not inform Thomas of her conversations with Marteisha until February 29, 2000. On that day Kivett met with Thomas. Marteisha's father, principal Loge, and guidance counselor Higgs, to discuss Marteisha's academic and behavior issues. During the conference, Kivett related to Thomas, who is African American, that Marteisha had told her that Thomas had called Mareisha a "bitch" and threatened. "Do bad, and I'll hit you like a nigger in the street." Thomas denies that ever said words to Marteisha. Following the conference, on March 1, 2000, Kivett called CPS to discuss her concerns about Thomas's treatment of Marteisha. She did not, however, report that had committed child abuse or neglect. Two years later, Thomas initiated this lawsuit against the school and its officials. (She also unsuccessfully sued CPS official in a separate lawsuit. Thomas v. Starks, 159 Fed. App'x 716 (7th Cir. 2005) (unpublished order). In addition to her claims that school officials had falsely reported child abuse and interfered with her parental

right by privately meeting with her daughter. Thomas alleged in her third amended complaint that the school had not allowed her to enroll her younger children at Lodge in retaliation for her public complaints about the school. After nearly three years of litigation, the district court granted the school's motion for summary judgment. Thomas, who was presented by appointed attorneys in the district court, proceeds pro se on appeal. She contends that the district court should have allowed her to proceed to trial on her equal protection claims, her due process claim, and her First Amendment Retaliation claim. She also asserts that the court committed various procedural errors. We address each of her contentions in turn. Thomas first argues that the district court erred in concluding that no reasonable jury could find that school officials discriminated her on the basis of her race, violation of her right to equal protection under law. To survive judgment. Thomas had to adduce sufficient evidence from which could conclude that the school officials' actions had a discriminatory effect and were motivated by discriminatory purpose. Wee Chavaz v. III. State Police, 251 F.3d 612, 635-36 (7th Cir. 2001). Thomas had to come forward with some evidence that she was treated differently than similarly situated parents who were not African-American, and the school officials filed the reports at least in part because of her race. See id. At 636, 645. She did neither. Thomas did not identify a single similarly situated parent nor has she identified any credible evidence to rebut the official's

affidavit testimony that they had made the reports in good faith, Indeed, Thomas has not come forward with any evidence that school officials were motivated by her race. The only evidence that could possible hint that Thomas's race was considered is that Kivett used the word "nigger"in repeating Thomas's alleged threat to hurt Marteisha. Although we have said that the of racial slurs can be strong evidence of racial animus, DeWalt v. Carter, 224 F 3d 607, 612 n.3(7th Cir. 2000), Kivett was reporting verbatim what Marteisha had told her. That indirect use of the slur, standing alone, is simply not enough evidence to support an inference of discriminatory intent. And, in any event, Kivett never filed a report with CPS. Thomas relies entirely on her own experiences—which, as we explained, she has not shown were discriminatory. And although she avers that she has personal knowledge of African-American parents experiencing similar treatment by school officials, she does not identify those persons, nor has she identified any example of discriminatory treatment. Thomas next argues that the district court erred in concluding that school officials were entitled to qualified immunity on Thomas's claims that counselor Kivet's private discussions with Marteisha violated Thomas's substantive due process right to direct the upbringing of her daughter. School officials were entitled to qualified immunity if the facts viewed in the light most favorable to Thomas, show that Kivett's conduct did not violate a constitutional right. See Scott v. Harris, 127 S. Ct 1769, 1774 (2007). If they

did show a violation, we would next ask whether the right was clearly established ate the time. Id. We need not proceed to the second step because Thomas has not shown that counselor's private discussions with Marteisha violated Thomas's Constitutional rights. We agree Thomas has a fundamental right, secured by the due process clause, to direct the upbringing and education of her child. See, e.g., Troxel v. Granville, 530 U.S. 67, 65-66)2000)(collecting cases). That right was articulated in Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925). Where the Supreme Court declared unconstitutional an Oregon law requiring partents to send their children to public schools, and in Meyer v. Nebrasha, 262 U.S. 390 (1923, where the Court held that a law restricting the instruction of foreign languages to children violated parents' right to employ a teacher to instruct their child, See id. at 400. But a right to choose the type of school one's child attends, or to direct the private instruction of one's child, does not imply a parent's rights to control every aspects of her. Child's education at a public school. See Fields v. Palmdale Sch. Dist., 427 F .2d 1197, 1204-07 (9th Cir. 2005); Leebaert v. Harrington, 332 F .3d 134, 140-42 (2d Cir. 2003); Brown v. Hot, Sexy & Safer Prods., Inc. 68 F .3d 525m 533-34 (1st Cir. 1995); cf. Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972) (limiting state's power over education when it implicates parent's rights under the Free Exercise Clause). Divett's affidavit testimony shows that her discussions with Marteisha were

academic in nature, focusing only on her problems performing and functioning at school. And Marteisha's vague description of the conversations as "personal" in her affidavit, signed at age 16 signed at age 16, does not rebut that testimony. Because Thomas pointed the court to no authority to support her claimed right to know about these academically oriented conversations when they occurred, the district court correctly concluded that the school officials were entitled to qualified immunity. Thomas also argues that the school officials denied her other children enrollment at Lodge—they were plaice in a different elementary school—in retaliation for Thomas's exercise of her First Amendment rights. Bus she had adduced no evidence to support the contention. James Trader, the Director of Student Services and Counseling at the Evansville-Vanderburgh School Corporation, avers that the decision was made to avoid confrontation between school staff and Thomas. Trader believed such a step was necessary because he learned that Thomas had said that she wished Trader would "have a heart attack and die" and that she wished principal Loge's breast cancer had killed her. Without evidence that even hints that the decision was made for constitutionally impermissible reasons, the district court properly dismissed the claim.

We next turn to Thomas's disagreements with the district court's handling various procedural matters. Her primary assertion, which she reiterates extensively, in her reply brief, is that the district court'

sua Sponte granted summary judgment without offering her an opportunity to cure the defect in her complaint. But the court did not sua sponte grant summary judgment the school mover for summary judgment after extensive discovery on both sides, and the court considered Thomas's responses to the motion before granting it. Thomas also, argues that the court should have granted oral argument on the summary judgment motion, but she has not shown that the district court abused its discretion to denying it. See S.D. IND. R. 7.5 (a). Thomas's other procedural arguments—failing to set trial date pending the outcome of the summary judgment motion, allowing extra pages in the school officials' submissions, and failing to hold a status conference after granting summary judgment—are all meritless. Finally Thomas appears to have abandoned her state law claims on appeal. In any even, she has not shown that the district court abused its discretion declining to exercise supplemental jurisdiction over the state law claims after dismissing the federal claims. See 28 U.S.C. 1367 (c)(3); Williams Elecs. Games, Inc. v. Garrity, 479 F .3d 904 (7th Cir. 2007)

AFFIRMED

APPENDIX (D)

COURT OF APPEAL OF THE 7th CIRCUIT ORDER ON PETITIONER HEARING EN BANC ON APRIL 02, 2008

Before

Hon. Kenneth F. Ripple, Chief Judge

Hon. Daniel A Manion Circuit Judge

Hon. Diane P. Wood, Circuit Judge

No. 07-2083 Appeal from the United States

District Court for the Southern District

Of Indiana, Evansville Division

Debra L. Thomas

v. Plaintiff-Appellant No. 02 C-M-24

Evansville-Vanderburgh School Corp. Larry J. McKinney, Chief Judge

Et al.,

Defendant-Appellees

ORDER

On consideration of the petition for rehearing en banc filed by petitioner-appellant, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny rehearing. The petition is therefore

DENIED

106

No. 08-243

Supreme Court, U.S.
FILED
SEP 25 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DEBRA L. THOMAS,

Petitioner,

v.

EVANSVILLE-VANDERBURGH SCHOOL CORPORATION, BOARD OF SCHOOL TRUSTEES OF THE EVANSVILLE-VANDERBURGH SCHOOL CORPORATION, PAT LOGE, SALLY KIVETT, JAMES TRADER, THOMAS HIGGS AND SHARON TURPIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant certiorari, where the Seventh Circuit's Opinion affirming the District Court's thorough analysis of Petitioner's evidence does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

2. Whether Petitioner has presented compelling reasons to grant certiorari, where the Seventh Circuit's Opinion affirming the District Court's treatment of procedural issues in the trial court, including its rulings as to summary judgment, tendered supplemental evidence, oral argument, Petitioner's request for reconsideration, and scheduling matters, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

3. Whether Petitioner has presented compelling reasons to grant certiorari, where the Seventh Circuit's Opinion finding that Petitioner had no claim or right to control every aspect of her child's education at a public school, and no right under the facts presented to be informed of the academically oriented conversations between her daughter and school counselors, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Defendants disclose that Defendant Evansville-Vanderburgh School Corporation is a public school corporation, not a stock corporation. It has no parent and no publicly held company owns 10% or more of the corporation's stock.

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Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065, 103 L.Ed.2d 809, 109 S.Ct. 1338 (1989) 22-23

Brown v. Board of Education, 347 U.S. 43 (1954) 18

Connick v. Myers, 461 U.S. 138 (1983) 21

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Foo v. Indiana University, 88 F.Supp.2d 937 (S.D. Ind. 1999) 17

Griffin v. Thomas, 929 F.2d 1210 (7th Cir. 1991) 21

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Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049, 79 L.Ed.2d 720, 104 S.Ct. 1325 (1984)	23
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COUNTERSTATEMENT OF THE CASE

This case arises from the actions and alleged actions taken by individuals employed by Respondent Evansville-Vanderburgh School Corporation ("EVSC") with respect to Marteisha Mosley ("Marteisha"), who is Ms. Thomas's daughter. Ms. Thomas complains of the EVSC's actions in providing Marteisha the services of a counselor and a special needs counselor and in making reports to Child Protective Services ("CPS"). (3d Am. Complaint, Doc. No. 104). Ms. Thomas pleaded ten separate claims for relief, including state law theories of negligence (failure to obtain parental consent for counseling), negligent and intentional infliction of emotional distress, invasion of privacy, false light publicity, and defamation, as well as federal claims under 42 U.S.C. § 1983, including alleged violations of Ms. Thomas's Equal Protection, Due Process and First Amendment speech rights due to alleged retaliatory conduct, discriminatory conduct, discriminatory pattern and practice, and negligent supervision.

On November 4, 2004, the District Court granted summary judgment to Respondents as to Ms. Thomas's federal claims and dismissed Ms. Thomas's state law claims because, without the federal claims, the District Court lost jurisdiction of the state law claims. (Order on Defendants' Motion for Summary Judgment, Doc. No. 156, Appellee's Appx. Tab 1). As to the federal claims, the District Court specifically found that:

- Ms. Thomas's equal protection claims fail because she failed to present evidence

that the Defendants' conduct toward her had a discriminatory purpose or effect;

- Ms. Thomas's claims of deprivation of equal protection due to established custom or policy fail because she did not identify any such policy, pattern, or custom;

- Ms. Thomas's claims of deprivation of due process (inferred from her response to the motion for summary judgment, not her pleadings) fail because the Defendants are entitled to qualified immunity.

(*Id.*).

On April 23, 2007, the District Court entered a final judgment disposing of all claims against all parties (including the Counterclaim voluntarily dismissed by the Respondents) pursuant to Fed.R.Civ.P. 58. (See Record, Document Nos. 156, 190 and 191). Ms. Thomas filed the Notice of Appeal with the Seventh Circuit Court of Appeals on May 9, 2007. The appeal appeared to address not only the summary judgment ruling, but also the District Court's decisions on several procedural matters, such as its denial of Petitioner's request for oral argument, and its refusal to accept additional tendered documents offered in opposition to the motion for summary judgment.

The Seventh Circuit issued its Nonprecedential Disposition on December 26, 2007, affirming the

appealed judgment and orders of the District Court. On January 9, 2008, Petitioner filed her Petition for Rehearing and Petition for Rehearing En Banc, both of which were denied by the Court of Appeals on April 2, 2008. Petitioner submitted her original Petition for Writ of Certiorari in this cause on June 26, 2008, but it was not docketed until it was revised and resubmitted by Petitioner on August 26, 2008.

STATEMENT OF FACTS

Defendant Sally Kivett is a Special Concerns School Counselor, to whom EVSC personnel refer students based on academic difficulties the students display, as Ms. Kivett is responsible for problem solving, crisis management, conflict resolution, crisis counseling, attendance problems, self esteem, home visits and other and areas of guidance. (Kivett Ans. to Int., No. 1, Appellees' Appx. Tab 3; Kivett Affidavit, Appellees' Appx. Tab 3; Loge (Edwards) Ans. to Ints., No. 16, and attached "Special Concerns Counselor Duties and Responsibilities", Appellees' Appx. Tab 4; Trader Affidavit, Appellees' Appx. Tab 7).

By policy, Special Concerns School Counselors and all School Counselors in the EVSC maintain the confidentiality of their communications with students unless a report is necessary. (*Id.*; Kivett Ans. to Ints., No. 5, Appellees' Appx. Tab 3). The EVSC policy requires notification of parents in cases of suicidal ideations or potentially damaging statements, none of which were present in this case until February 2000, when Marteisha's behavior and actions were increasingly disturbing, at which point EVSC personnel

contacted Ms. Thomas. (Kivett Ans. to Ints., No. 5, Appellees' Appx. Tab 3).

It is EVSC policy and practice that school counselors do not need parental consent to call a student out of class, and here, the principal of Lodge Elementary School ("Lodge"), Pat (Loge) Edwards, authorized Ms. Kivett to see Marteisha based on numerous referrals from the nurse, teachers and the building counselor. (Kivett Ans. to Ints., No. 6, Appellees' Appx. Tab 3; Trader Ans. to Ints., Nos. 17, 18, Appellees' Appx. Tab 7).

On two occasions, Ms. Kivett discussed with Ms. Thomas problems with Marteisha's attitude and behavior in the school environment, and one of those occasions included Marteisha's biological father, as well. (Kivett Ans. to Ints., No. 7, Appellees' Appx. Tab 3). (Id.). The meetings concerned Marteisha's altercations with another student, and "escalating exotic behavior" displayed by Marteisha. EVSC personnel discussed with Ms. Thomas recommendations including involvement at church, contacting the family physician, and the YMCA "Diamonds" group, to help Marteisha with her self esteem issues. Ms. Thomas told the EVSC personnel at that time that she was "ready for someone else to take over Marteisha." (Kivett Ans. to Ints., No. 7, Appellees' Appx. Tab 3).

During the conference on February 29, 2000, Ms. Kivett related to Ms. Thomas certain statements Marteisha had made, specifically that Marteisha said Ms. Thomas had called her a "bitch," and threatened, "Do bad, and I'll hit you like a nigger in the street."

(Kivett Ans. to Ints., No. 17, Appellees' Appx. Tab 3). However, there was no report that Ms. Thomas had, in fact, done the things she was apparently threatening to do, so no child abuse report was made concerning those statements. (Kivett Ans. to Ints., No. 18, Appellees' Appx. Tab 3).

Ms. Kivett and Marteisha discussed various topics in the context of school counseling due to academic problems and referrals from teachers, the nurse and the counselor at Lodge. (Kivett Ans. to Ints., No. 23, Appellees' Appx. Tab 3; Kivett Affidavit, Appellees' Appx. Tab 3). The counseling sessions were academic in nature and intent. (Id.).

Defendant Tom Higgs was a School Counselor at Lodge, whose interaction with Marteisha was also limited to school counseling with the goal of helping Marteisha work through problems affecting her school work and causing her to be referred to him by teachers and administrators. (Higgs Ans. to Ints., No. 1, Appellees' Appx. Tab 5). (Higgs Affidavit, Appellees' Appx. Tab 5).

Several EVSC employees made reports of possible child abuse to Child Protective Services regarding Marteisha, including:

- Sharon Turpin, teacher, reported to the principal Marteisha's statement that Ms. Thomas told her not to open a can of soup, and that, when Ms. Thomas came home and found the soup can open, Ms. Thomas had Marteisha take all her

clothes off except her underwear and paddled Marteisha with a belt. (Loge (Edwards) Ans. to Ints., No. 14, Appellees' Appx. Tab 4; Turpin Ans. to Ints., No. 4, Appellees' Appx. Tab 6; Child Abuse and Neglect Reports, and CPS Investigation Reports, attached to Trader Ans. to Ints., Appellees' Appx. Tab 7);

- Debra Kasacavage, teacher, reported Marteisha's statement to her that Ms. Thomas had become angry with her over "bad grades," and had struck her with an extension cord. (Kasacavage Affidavit, Appellees' Appx. Tab 15; Reports, attached to Trader Ans. to Ints., Appellees' Appx. Tab 7);

- Marilyn Wright, school nurse, reported blueish-purple raised marks on Marteisha's right arm and Marteisha's statement that Ms. Thomas had whipped her with an extension cord, and that Ms. Thomas had promised not to do it again and told her not to tell anyone; on a separate occasion, Ms. Wright reported two reddish raised marks on Marteisha's right thigh, one approximately six inches long and the other approximately three inches long, and Marteisha's statements that Ms. Thomas was mad at her and had whipped her with an electrical cord the prior evening; on a third occasion,

Ms. Wright reported that Marteisha came to the nurse's office that morning to complain that her back was sore from where her mother had whipped her with a switch that morning, although Ms. Wright also reported that she had found no marks on Marteisha that time. (Wright Affidavit, Appellees' Appx. Tab 14; Child Abuse and Neglect Reports, and CPS Investigation Reports, attached to Trader Ans. to Ints., Appellees' Appx. Tab 7).

- Frances Seifert, substitute teacher, corroborated one of Ms. Wright's reports based on Ms. Seifert's own observations and statements made by the child. (Seifert Affidavit, Appellees' Appx. Tab 16; Child Abuse and Neglect Reports, and CPS Investigation Reports, attached to Trader Ans. to Ints., Appellees' Appx. Tab 7).

- Pat Loge (now Edwards), Principal, reported that Marteisha rode the city bus to the babysitter's house, as Ms. Edwards was concerned about the danger of a 10 year old child riding a city bus alone, rather than using school transportation or being picked up at school by a responsible adult. (Loge (Edwards) Ans. to Ints., No. 14, Appellees' Appx. Tab 4; Reports attached to Trader Ans. to Ints., Appellees' Appx.

> Tab); on a separate occasion, Ms. Edwards reported the "soup can" and paddling incident described by Ms. Turpin (see above) (Loge (Edwards) Ans. to Ints., No. 14, Appellees' Appx. Tab 4; Child Abuse and Neglect Reports, and CPS Investigation Reports, attached to Trader Ans. to Ints. , Appellees' Appx. Tab 7); on a third occasion, Ms. Edwards reported that Ms. Thomas had called Ms. Edwards at approximately 7:50 a.m. that morning, and had stated to Ms. Edwards that Ms. Thomas did not want Marteisha in the house, that Marteisha needs to go to "Hillcrest" (a local youth residential care facility) where Marteisha can "get sex," that Ms. Thomas did not want Marteisha anymore and wanted Marteisha out of her house, and was afraid she (Ms. Thomas) would "kill" Marteisha (Loge (Edwards) Ans. to Ints., No. 14, Appellees' Appx. Tab 4; Reports attached to Trader Ans. to Ints., Appellees' Appx. Tab 7).

Ms. Thomas alleged at one point in the lower court that the Evansville Police Department was called by someone at the EVSC regarding a complaint against Ms. Thomas, but the EPD was never called. (Trader Ans. to Ints., No. 10, Appellees' Appx. Tab 7).

EVSC policy and procedure requires school personnel to make a report each time they "suspect or know of an incident of sexual abuse, child abuse or child

neglect," but does not provide for the school personnel to investigate the incident; rather, the incident is reported to CPS, whose case workers make the investigations. (Kivett Ans. to Ints., No. 4, and attached Procedures, Appellees' Appx. Tab 3; Trader Ans. to Ints., No. 4, Appellees' Appx. Tab 7).

Once CPS makes its investigation, a report is labeled "abuse substantiated" or "abuse unsubstantiated." On at least two occasions, reports of abuse made against Ms. Thomas regarding Marteisha were "substantiated," namely the reports of March 25, 1998 and December 8, 1998. (Affidavit of Shirley Starks, Appellees' Appx. Tab 17; Reports attached to Trader Ans. to Ints., Appellees' Appx. Tab 7). Where CPS determines the child abuse report to be "unsubstantiated," all records of it are expunged from CPS pursuant to office policy and Indiana law. (Affidavit of Shirley Starks, Appellees' Appx. Tab 17). As such, CPS has no record of the investigation of the other child abuse reports. (*Id.*).

Even though many of the child abuse reports were apparently deemed "unsubstantiated," none were considered intentional false reports. (Affidavit of Shirley Starks, Appellees' Appx. Tab 17).

No student is situated similarly to Marteisha and no parent is situated similarly to Ms. Thomas. No one similarly situated to either would be treated any differently by the EVSC regardless of race. Any negative reaction Ms. Thomas has perceived from the EVSC has been to her attitude and approach in dealing with the issues involved in this case, including her statements to staff that she wished Mr. Trader would have a heart

attack and die, and her statements to Principal Pat (Loge) Edwards that she wished Ms. Edwards' breast cancer had killed her. The manner in which EVSC personnel have dealt with Ms. Thomas has nothing to do with her race, but rather with the specific facts and circumstances. (Trader Affidavit, Appellees' Appx. Tab 9; (Loge) Edwards Affidavit, Appellees' Appx. Tab 10).

Ms. Thomas withdrew her other children who had been enrolled at Lodge for the 2002-2003 school year because she did not wish them to be there in light of the current controversy; therefore, they were placed at Culver School. (EVSC Ans. to Ints., No. 9, Appellees' Appx. Tab 8). Shortly before the 2003-2004 school year began, Ms. Thomas asked that the children be placed back at Lodge. The EVSC rejected the request, not in retaliation for the current litigation, but rather for the same reason Ms. Thomas herself had withdrawn the children from Lodge originally: to avoid confrontation with Lodge personnel, including individual Respondents in this lawsuit, and to defuse the situation as much as possible. (*Id.*; Trader Affidavit, Appellees' Appx. Tab 9; (Loge) Edwards Affidavit, Appellees' Appx. Tab 10).

REASONS FOR DENYING THE PETITION

I. Petitioner has Presented No Evidence or Argument Bearing on the Considerations Governing Review.

Ms. Thomas has not presented any compelling reasons (or any reasons at all) to grant certiorari. The Seventh Circuit's Opinion affirming the District Court's thorough analysis of Petitioner's evidence, and affirming the District Court's treatment of both substantive and procedural issues does not conflict with a decision of this Court or a Court of Appeals, and Petitioner does not claim that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court. S.C.Rule 10. Most importantly, Rule 10 provides that and certiorari will not generally be granted where "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S.C.Rule 10.

Regarding the review of procedural issues, Ms. Thomas identifies the District Court's refusal to accept her tendered supplemental evidence, its denial of her request for oral argument, and other matters involving scheduling conferences and requests for reconsideration. These are repeatedly mentioned in the Petition under "Questions for Review" but no evidence or authority is given as to why the court was wrong, let alone why this Court should review those decisions.

Regardless of Ms. Thomas's focus on procedural matters in her "Questions for Review," the bulk of the

Petition seems to address the substantive merits of her case and the Seventh Circuit's affirmation of summary judgment for the Respondents, in spite of her voluminous appellate appendix, which she alleges was evidently ignored by the Seventh Circuit. Although this Court sometimes reviews a grant of summary judgment de novo, this Court is in no better position than the District Court and the Court of Appeals to evaluate evidence at issue in this case. *See United States v. Winstar Corp.*, 518 U.S. 839, 860-861 (1996). It would be a waste of limited judicial resources, not to mention the resources of Respondents, to accept this case for review and thus repeat the process already undertaken (twice) by the courts below. The Petition is simply Ms. Thomas's attempt to have another chance to prove claims that have failed thus far, simply by switching to a different forum. However, those claims are nonetheless addressed below.

II. Federal Claims

To establish a valid claim under 42 U.S.C. § 1983, a claimant must show: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.E.2d 420 (1981).

A. Defendants are Entitled to Qualified Immunity from Liability.

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). If the law was not "clearly established," no liability should result because "an official could not reasonably be expected to anticipate subsequent legal developments, nor could be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.*

The question here is whether the law "clearly establishes" the basis for Ms. Thomas's claim, and whether that law was clearly established at the times of the actions in question, i.e., whether a reasonable state actor would have known that his actions, viewed in the light of the law at the time, were unlawful. *McDonald v. Haskins*, 966 F.2d 292, 294 (7th Cir. 1992).

The EVSC personnel followed the mandates of Indiana law requiring school employees to report, but not investigate, every possibility of abuse or neglect upon "reasonable suspicion," even if it is ultimately shown that no abuse or neglect occurred. I.C. § 31-33-5-1 *et seq.* EVSC employees confronted with any evidence of child abuse or neglect may be subject to criminal and civil liability if they do not make a report. *Id.*

Those who make the reports, cause them to be made, or otherwise participate in proceedings or investigations involving child abuse and neglect, are immune from liability, even when a report turns out to be unsubstantiated. I.C. § 31-33-6-1.

The EVSC personnel had no reason to believe their actions were unlawful, and their actions were not unlawful. No evidence suggests they knew the reports were false, and on at least some of the occasions, CPS substantiated the allegations. (See Investigation Reports, Form FFP311, attached to Trader Ans. to Ints., Appellees'Appx. Tab 7).

Moreover, EVSC personnel counseled Ms. Thomas's daughter appropriately and without Ms. Thomas's knowledge or consent because there was no legal requirement, known to them or not, for prior knowledge and consent under those circumstances.

As the Seventh Circuit below stated in its Order:

> [A] right to choose the type of school one's child attends, or to direct the private instruction of one's child, does not imply a parent's right to control every aspect of her child's education at a public school. *See Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204-07 (9th Cir. 2005); *Leebaert v. Harrington*, 332 F.3d 134, 140-42 (2d Cir. 2003); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533-34 (1st Cir. 1995); cf. *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972) (limiting state's power over education when it implicates parent's rights

> under the Free Exercise Clause). Kivett's affidavit testimony shows that her discussions with Marteisha were academic in nature, focusing only on her problems performing and functioning at school. And Marteisha's vague description of the conversations as "personal" in her affidavit, signed at age 16, does not rebut that testimony. Because Thomas pointed the court to no authority to support her claimed right to know about these academically oriented conversations when they occurred, the district court correctly concluded that the school officials were entitled to qualified immunity.

(Slip Op. at 4). Also persuasive is the analysis in *Roman v. Appleby*, 558 F.Supp. 449 (E.D. Pa. 1983), involving facts strikingly similar to those in this case. The *Roman* court discussed the relationship between the family and the government, particularly in the school setting as *parens patriae*, in raising children and providing for their well-being; it concluded that the school counselor there had no reason to believe her actions were illegal or unconstitutional, particularly in light of her legal obligation to report any reasonable basis for suspecting child abuse or neglect, and that the constitutional right of parents to raise their children does not mean that schools are constitutionally restricted from providing counseling, even on sensitive topics that the parents would rather address themselves. *Id.* at 455-461.

Finally, Ms. Thomas's claims are inconsistent with Indiana law specifically providing that the relationship and interactions between student and counselor are

confidential, that communications between school counselors are privileged from disclosure, and that school counselors are immune from disclosing privileged or confidential communications made by a student. I.C. 20-6.1-6-15. Indiana law does not provides that the counseling itself, or this immunity and confidentiality, requires a parent's prior approval, consent or knowledge. To the contrary, such an obligation would be inconsistent with concepts of confidentiality and immunity, particularly since many such communications, as in this case, pertain to and even implicate the parent; therefore, requiring consent would have a chilling effect upon the confidential relationship between students and school counselors, and would discourage students from disclosing important matters including allegations of child abuse and neglect.

B. Ms. Thomas Cannot Support Any Claims Against the EVSC Itself.

Ms. Thomas's claims that the EVSC itself is liable for the creation of "policies and customs" that allegedly led to deprivation of Ms. Thomas's constitutional rights (3d Am. Complaint, ¶¶ 76-77) fail because they do not implicate fundamental rights and because Ms. Thomas cannot satisfy the elements of liability for policymaking.

1. Fundamental Rights

When the focus of a substantive due process case is on legislation or rule-making (including policymaking), as opposed to a specific act of a governmental official, the court must decide whether the legislation interferes with "certain fundamental rights and liberty interests."

Foo v. Indiana University, 88 F.Supp.2d 937, 961 (S.D. Ind. 1999), *citing Dunn v. Fairfield Community High School District No. 225*, 158 F.3d 962, 966 (7th Cir. 1998), *quoting Washington v. Glucksberg*, 117 S.Ct. 2258, 2267 (1997).

This Court in *Glucksberg* set out two features of this analysis:

> First, . . . the due process especially protects those fundamental rights and liberties which are, objectively, deeply rooted in this nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions and practices thus provide the crucial guideposts for responsible decision making that direct and restrain our exposition of the due process clause.

Foo, 88F.Supp.2d at 961, *quoting Glucksberg*. Accordingly, a court must "carefully formulate the interest that [plaintiffs] want constitutionally protected." *Foo*, 88 F.Supp.2d at 961, *citing Khan v. Gallitano*, 180 F.3d 829 (7th Cir. 1999) (*quoting Glucksberg*, 117 S.Ct. at 2269).

This Court has long held that a student's interest in education is not a fundamental right. *Foo*, 88 F.Supp.2d at 961, *citing San Antonio Independent*

School District v. Rodriguez, 411 U.S. 1 (1973). However, in *Rodriquez*, this Court also acknowledged its prior recognition in *Brown v. Board of Education*, that "education is perhaps the most important function of state and local governments." *Rodriguez*, 411 U.S. at 29 *quoting Brown v. Board of Education*, 347 U.S. 43 (1954). The Court reaffirmed its historic dedication to public education but noted that "[t]he importance of a service performed by the state does not determine whether it must be regarded as fundamental . . . ." *Rodriguez*, 411 U.S. at 31.

> It is not the province of this Court to create substantive constitutional rights . . . . Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative social significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Id. at 33. The *Rodriguez* Court held that "education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* at 35. Ms. Thomas's assertion that the alleged deprivation of some aspect of her daughter's alleged fundamental educational right protected by the 14th Amendment is thus contrary to Supreme Court precedent.

Finally, Ms. Thomas does not allege that the state law remedy is inadequate or that EVSC has prevented Ms. Thomas from relief under state law. In fact, her pleadings allege claims for relief under Indiana law, thereby admitting that an adequate remedy exists under state law. Under the *Glucksberg* fundamental-rights analysis, Ms. Thomas's substantive due process claim fails as a matter of law. *See Wudtke v. Davel*, 128 f.3D 1057, 1062 (7th Cir. 1997).

2. Policy or "Constitutional" Claims

Ms. Thomas claims she was deprived of equal protection rights as a direct result of "persistent policies or customs which were racially hostile and which were the moving force" of such violations, that the EVSC and its board were "deliberately indifferent with respect to the establishment of policies or customs" concerning protected rights, and that they "conducted inadequate training" (of whom, she does not say) with respect to those protected rights. (3d Am. Complaint, ¶ 75, 76, 77).

Ms. Thomas also claims that the EVSC and its Board "retaliated" against her for exercising her first amendment rights to freedom of speech, because she expressed her concerns "with respect to the unconsented to counseling sessions, the obtaining private information from plaintiffs daughter, and the general manipulation of plaintiffs daughter" to school officials. She claims this retaliation came in the form of "forcing her children to attend a school outside their home district during the 2003-2004 school year" and "manufacturing false child abuse reports against plaintiff." She also claims she was retaliated against

because she "exercis[ed] her due process rights to file a complaint concerning defendants' actions in a court of law." (Complaint, Count X).

Ms. Thomas's § 1983 claims against the EVSC or its Board fail because she does not establish (1) an express policy in the school system that when enforced caused a constitutional deprivation; or (2) a practice or custom by the school system of such unconstitutional conduct; or (3) a constitutional injury caused by a person with final policy making authority. *Oliver v. McClung*, 919 F.Supp 1206, 1212 (N.D. Ind. 1995); *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Ms. Thomas does not identify any express policy causing constitutional deprivation, so this brief addresses only the second and third elements.

3. Free Speech – Retaliation

Ms. Thomas claims EVSC impaired her right to free speech by denying her children placement at Lodge Elementary School, which is only a few blocks from her home, and instead placing them at Culver Elementary School, which is farther away, all in retaliation against her for complaining about the events at issue in this case. (3d Am. Complaint, Count X). Ms. Thomas claims the alleged "manufacturing of false child abuse reports" by EVSC employees was likewise retaliatory. (*Id.*).

Ms. Thomas's children were placed at Culver because Ms. Thomas had withdrawn them from Lodge for the 2002-2003 school year on the basis that she did not wish them to be there in light of the current controversy. Nonetheless, shortly before the 2003-2004

school year began, Ms. Thomas asked that the children be placed back at Lodge. The EVSC denied this request, not in retaliation for the current litigation, but rather for the same reason Ms. Thomas herself had withdrawn the children from Lodge originally – to avoid confrontation with Lodge personnel, including individual Respondents, and to defuse the situation as much as possible. (EVSC Ans. to Ints. No. 9, Appellees' Appx. Tab 8; Trader Affidavit, Appellees' Appx. Tab 9; Edwards Affidavit, Appellees' Appx. Tab 10).

The child abuse reports were neither "manufactured" nor "false." Moreover, there are no facts to support Ms. Thomas's allegation that the EVSC itself, or its Board, had anything to do with the reports.

Ms. Thomas's claims also do not meet the standards set under first amendment's "petition clause" deprivation cases, because the speech at issue does not touch upon matters of public, rather than private, concern. *Griffin v. Thomas*, 929 F.2d 1210 (7th Cir. 1991), *citing Connick v. Myers*, 461 U.S. 138 (1983). Ms. Thomas's speech simply complained about the way particular EVSC employees treated her and her daughter as individuals, which is a matter of only private concern to Ms. Thomas herself.

C. Ms. Thomas Was Not Deprived of Equal Protection Rights.

The Petition fails to show any of the requisite proof that any Respondent "acted with a nefarious discriminatory purpose . . . and discriminated against [the claimant] based on his membership in a definable

class." *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996), *citing Personnel Adm'r of Massachusetts v. Feeney*,442 U.S. 256, 279, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979), *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), *aff'd*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994); *Falls v. Town of Dyer*, 875 F.2d 146, 148 (7th Cir. 1989).

As the Seventh Circuit has explained:

> The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action. A plaintiff must demonstrate intentional or purposeful discrimination to show an equal protection violation. Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group.

Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982) (citations and internal quotations omitted). Accordingly, a showing that the defendants were negligent is insufficient; rather, the claimant must show that the defendants acted intentionally or with deliberate indifference. *Nabozny, supra* at 454, *citing Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065, 103 L. Ed. 2d 809, 109 S. Ct. 1338

(1989); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049, 79 L. Ed. 2d 720, 104 S. Ct. 1325 (1984); *Shango*, 681 F.2d at 1104.

Ms. Thomas states repeatedly in her Petition that the actions of the individual Respondents, under color of state law, violated her equal protection rights, stating that similarly situated individuals of other races are treated differently by the Respondents, but provides no evidence of different treatment based on race.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 2 2 2008
OFFICE OF THE CLERK

109 (3)

NO. 08-243

IN THE
Supreme Court of the United States

DEBRA L. THOMAS

Petitioner,

v.

EVANSVILLE VANDERBURGH SCHOOL CORPORTATION, BOARD OF SCHOOL TRUSTEES OF THE EVANSVILLE – VANDERBURGH SCHOOL CORPORATION, PAT LOGE, SALLY KIVETT, JAMES TRADER, THOMAS HIGGS AND SHARON TURPIN,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court judge erred under Rule 59 (e), that authorizes relief when party clearly establish (es) either manifest error of law or fact or 'present (s) newly discovered evidence. See Souter v. International Union, 993 F .2d 495, 599 (7th Cir. 1993) (quoting Federal Deposit Ins. Corp. v. Meyer, 781 F .2d 1256, 1268 (7th Cir. 1986).

2. Whether Court of Appeals erred for denying Petitioner's motion for Rehearing and Rehearing En Banc, when Petitioner provided evidence of record that the District Court received and filed stamped Petitioner's eighteen supplemental pages of genuine issues of material fact to survive summary judgment on August 16, 2004.

3. Whether the Court of Appeals erred for not remanding Petitioner's case back in District Court with instruction when the Court of Appeals has stated that "The Court of Appeals has explained that there are only three valid grounds for a Rule 59 (e) motion-newly discovered evidence, an intervening change on the law, and manifest error of law. See Cosgrove v. Bartolotta, 150 F .3d 729, 732 (7th Cir. 1998).

4. Whether the Court of Appeals overlooked the District Court manifest error when the court misapprehended the Petitioner's claims, and

misapplied the law to Petitioner's claims in light of the pertinent law.

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, petitioner addresses the following new points raised in the Brief in Opposition.

1. The District Court manifest error deserves attention of this court to review and grant Petitioner's Writ Certiorari grounds under Rule 59 (e). (See record Document No. 150, 156).

REPLY TO COUNTERSTATEMENT

Petitioner's complaint is against the Respondents' in their individual capacities while acting under color of law for falsifying ten handwritten Evansville Vanderburgh School Corporation child abuse and neglect form (DOSS-509), and had forwarded the falsified ten child abuse report to the Child Protection Services that had Petitioner investigated under false pretense by the Child Protection and the Evansville Police Department.

This first issue should be an important interest to this Court. On November 04, 2004, the District Court Judge should have not granted the Respondents' their motion for summary due to the fact that the District Court committed a manifest error under Rule 59 (e). By misapprehended Petitioner's eighteen additional supplemental pages of genuine issue of material fact to survive summary judgment that was filed stamped by the Court on August 16, 2004, but was not applied to Record of Document. Respondents on September 24, 2004, filed their motion for the Court for Order

regarding supplemental filed by Plaintiff. (See Record of Document No. 150).

This second issue should also be an important interest of the Court. The Respondents states that Ms. Thomas claim failed because she failed to present evidence that the Defendants' conduct toward her had a discriminatory purpose or effect. First, Petitioner claim is against the Respondents under 42 USC 1983 Civil Rights for reporting their child fabricating ten handwritten child reports to the Child Protection Services that had Petitioner investigated by the Child Protection Services and the Evansville Police Department. (See Record of Document No. 141). Second, Petitioner claim failed because the District Court filed stamped Petitioner's eighteen pages of genuine material of fact to survive summary judgment but Petitioner's motion providing eighteen pages of factual material evidence was kept off record of document number by the Court.

The third issue should be a interest to this court. On March 03, 2005, Petitioner filed her notice of Appeal. (See Record of Document No. 172). On September 18, 2006, the Court of Appeals Dismissed Petitioners' Appeal for lack of jurisdiction. (See Record of Document No. 183). The Court of Appeals ORDER on August 23, 2006, states that Generally, an appeal may not be taken in a civil case until a final judgment disposing of all claims against all parties is entered on the district court's civil docket pursuant to Fed. R. Civ. P. 58. See Cleaver v. Elias, 852 F .2d 266 (7th Cir. 1988). Also stating that in the present case, the district court had not disposed of defendants' counterclaim at the time appellant filed her appeal,

and defendants-appellees were unwilling to unconditionally dismiss their counterclaim. ((See Record of Document No. 184,185,186,187,188,189,190,191).

The Fourth issue should be an important matter of this court regarding the Order of the Court of Appeals for denying Petitioner for hearing and Rehearing En Banc. Pursuant to Federal Rules of Civil Procedure Rule 59(e) "authorizes relief when a moving party clearly establishes either a manifest error of law or fact or presents newly discovered evidence. See Souter v. International Union, 993 F .2d 1260, 1268 (7th Cir. 1993). (quoting Federal Deposit. The Court of Appeals has explained that there are only three grounds for a Rule 59(e) motion—newly discovered evidence, an intervening change in the law, and manifest error in law. (See Cosgrove v. Bartolotta, 150 F .3d 729, 732 (7th Cir. 1998).

REPLY TO STATEMENT OF FACTS

Respondent's Sally Kivett, Pat Loge, Jim Trader, Thomas Higgs, Evansville Vanderburgh School Corporation and the Evansville Vanderburgh Board of Trustees, are in their individual capacities while acting under color of state law falsified ten child abuse reports to the Child Protection Services that had Petitioner investigated by third parties the Child Protection Services and the Evansville Police Department. The government did not give Local Government Respondents in their individual capacities while acting under color of law power or authority to violate Petitioner's Federal Protect rights while acting under color of law. The Evansville Vanderburgh Board of Trustees the final policy

making adopted two policies. (1) Procedure to be followed in dealing with alleged sexual abuse, child abuse and child neglect. (2) Special Concerns Counselor Duties and Responsibilities. Both of the adopted policy was violated by the Respondents in their individual capacity while acting under color of law. The Board of Trustees final policy making had knowledge that the Respondents in their individual capacities while acting under color of law had stepped beyond their boundaries allowing Respondents' Pat Loge, Sally Kivett, Jim Trade, Thomas Higgs, and Sharon Turpin to deprive Petitioner of the 42 1983 Civil Rights by fabricating with knowledge ten child abuse report that had Petitioner investigated by third parties the Child Protection Services and the Evansville Police Department. Also, is liable for Respondent Sally Kivett Special Concern Counselor in her individual capacity while acting under color of law for interfering with Petitioner's parental rights to her child. (Marteisha Mosley), taking Petitioner's daughter out of class for three years every Tuesday and sometimes on Thursday without Petitioner's knowledge or consent that has violated Petitioner's Constitution Rights. (1). Petitioner's Fourth and Fifth Due Process Clause was violated that heightened protection against government interference with certain fundamental rights and liberty interest. (2). Petitioner's Fourteenth Amendment was violated by the Respondents in their individual capacities while acting under color of law for fabricating ten child abuse reports to the Child Protection Services that had Petitioner investigated by the Child Protection Services and the Evansville Police Department. The Petitioner Fourteenth Amendment was deprived by Respondents that

deprived Petitioner her right equal protection right that no State shall "deprive any person of life, liberty, or property without due process of law.

The Federal Law states that Local Governments, municipal corporation, and school boards are "person: subject to liability under 42 USC 1983 for violating another person's federally protected rights, and thus are not wholly immune from suit under 1983-statue covering legal as well as natural person; as persons; local governing bodies can be sued directly under 1983 for monetary, declaratory, or injunctive relief where the action that is allege to be unconstitutional implements or executed policy statement, ordinance, regulation or decision officially adopted and promulgated by that bodies officers; local government officials sued in their official capacities, are "persons" under 42 USC 1983-which imposed civil liability on any person who deprives another of his federally protected rights-in those cased in which local government would be suable in its own name. (See Monell v. Department of Social Services (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018, 17 BNA FEP Cas 873, 16 CCH EPD 8345. Action for money damages under 42 USCS 1983 would lie against individual members of school board. (See Endiott v. Van Petten (1971, DC Kan) 330 F Supp 878.

REASON TO GRANT PETITIONER'S WRIT CERTIORARI

The District Court manifest error is grounds under 59 (e), to grant Petitioner's Writ Certiorari, and because Respondents' violated Petitioner's Constitution rights.

REPLY TO FEDERAL CLAIMS

The Respondents in their individual capacities while acting under color of law deprived Petitioner of her Fifth and Fourteenth Due Process Clause Amendment Constitution of the United States had reported with knowledge over ten child abuse reports against Petitioner that had Petitioner investigated by third Parties the Child Protection Services and the Evansville Police Department. By Law, the Child Protection Services had to investigate the report by the school whether it's frivolous or not. The Respondents fabricated child abuse report to the Child Protection Services has assassinated Petitioner Character, that has deprived Petitioner of her right to own and operate her own business called "Home Away from Home to rescue under privilege children. Respondents in their individual capacities while acting under color of law fabricated child abuse reports to the Child Protection that has damaged Petitioner's reputation that Petitioner will never be able to get her license to operated her own business with working with children. The Respondents willful acts of assassinating Petition character is a injury sustained under 1983.

The Fourteenth Amendment to the United States Constitution provides that no state deprive any person of life, liberty, or property without due process law. The Supreme Court has long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more that fair process." Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Washington, 521 U.S. at 720 see also Reno v. Flores, 507 U.S. 291, 301-302 (1993). More recently

Supreme Court has recognized the fundamental right of parents to make their decisions concerning the care, custody, and control of their children. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

REPLY TO DEFENDANTS ARE ENTITLED TO QUALIFED IMMUNITY FROM LIABILITY

The government did not give the Local Government Respondents in their individual capacities while acting under color of law Local authority or power to deprive Petitioner of her 42 U.S.C.S. 1983 Civil Rights and violate Petitioner's Fourth Fifth Due Process Clause.

CONCLUSION

For the reasons set forth above, the Petition Writ of Certiorari should be granted.

Respectfully Submitted,

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(4)

Supreme Court U.S.
FILED
NOV 24 2008
OFFICE OF THE CLERK

No. 08-243

IN THE
Supreme Court of the United States

DEBRA L. THOMAS

Petitioner

v.

EVANSVILLE VANDERBURGH SCHOOL CORPORATION, BOARD OF SCHOOL TRUSTEES OF THE EVANSVILLE VANDERBURGH SCHOOL CORPORATION, PAT LOGE, SALLY KIVETT, JAMES TRADER, THOMAS HIGGS AND SHARON TURPIN,

Respondents,

ON PETITION FOR A WRIT CERTIORARI OF THE UNITED STATES COURT OF APPLEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR REHEARING

DEBRA THOMAS
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PETITION FOR REHEAR

Pursuant to Rule 44.2, Petitioner Debra L. Thomas respectfully petition for Rehearing of the Court's November 02. 2008, decision, specifically, Petitioner claim against the Respondents' were in good faith that demonstrates a Constitutional violation of Petitioner's Fourteenth due process right. This Petition for Rehearing is intended to clarify arguments advanced in original petition for Writ Certiorari. The Petitioner is asking this Supreme Court for a second chance to review Petitioner's Brief that has demonstrate the lower court's processing error of Federal Law. The lower court error has deprived Petitioner of her Civil Rights 1983 complaint against the local Government whom is a local governmental entity that is being sued in their individual capacities while acting under color of State law. Upon depriving Petitioner of her secured Federal 1983 Civil Right and violation of Petitioner of fourteenth Amendment due process right. Local Government and school boards are "person subject to liability under 42 USC. 1983 for violating Petitioner's federally protected right, and thus are not wholly immune from suit under 1983-statue covering legal as well natural person; local governing bodies can be sued directly under 1983 for monetary, declaratory relief where the action is alleged to be unconstitutional implements or executes policy statement, ordinance, regulation or decision officially adopted and promulgated by that bodies officers; local government officials adopted and promulgated by "person: under federally protected right-in this case the Respondents' whom are a local governmental entity can be sued under a 1983 Civil Rights deprivation and for violation of Petitioner's United States fourteenth due process protection. These and other circumstances in Petitioner's entire brief are grounds not previously presented "R. 44.2.

I. REVIEW THE FEDERAL LAW OF THE FEDERAL RULES OF CIVIL PROCEDURE RULE 56 GROUNDS FOR GRANTING SUMMARY JUDGMENT

The Procedure to Grant Summary on a motion for summary judgment a court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." The courts have repeatedly held that summary judgment is to be applied cautiously." Evidence should be "viewed in al light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Summary judgment involves only legal question and the existence of any disputed material issue.

The Federal Rules of Civil Procedure 56 ruling for summary judgment is not to be intended to be employed as calendar-cleaning device. See: Smith v. Enocha (1964, SD Miss) 233 F Supp 925, 64-2 USTC 9769, 14 AFTR 2d 5626, affd (1966, CA5 Miss) 359 F2d 924, 66-1 USTC 9378, 17 AFTR 2d 801 (superseded by statue on other grounds as stated in United States v. Hunter (In re Walter (1995, CA6 Ohio) 45 F3d 1023, 32 CBC2d 1456, CCH Bankr L Rptr 76363, 95-1 USTC P 50072, 75 AFTR 2d 821, 1995 FED App 43P).

District Courts are authorized to provide by rule that party desiring oral argument on motion for summary judgment under Rule 56, must apply therefore, in absence of which oral argument will be deemed waived; however, District Court may not by rule otherwise preclude party opposing motion unless motion is denied. Fernhoff v Tahoe Regional Planning Agency (1986, CA9 Nev) 8903 F2d 979.

The Federal Rules of Civil Procedure Rule 56 is a useful

device for unmasking frivolous claims and putting swift end to meritless litigation. See: Quin v Syracuse Model Neighborhood Corp. (1980, CA2 NY) 613 F2d 438. Also, Federal Rules of Civil Procedure Rule 56 is to eliminate frivolous lawsuits which may occasional arise. Black-hawk Heating & Plumbing Co. v Driver (1970) 140 US App DC 31, 433 F2d 1137.

Finally, unless claim is frivolous, court cannot sua sponte enter summary judgment or dismiss complaint without notifying parties of its intentions and allowing them opportunity to cure defect in complaint or respond. English v. Cowell (1993, CA7 III) 10 F3d 434, 144 BNA LRRM 2754, 126 CCH LC 10928, 27 FR Serv 3d 513.

II. GROUNDS TO GRANT REHEAR

The 7th Circuit erred by making a decision of an issue that was never an issue on Appeal or brief in petition. See: Owasso Independent School Dist. No. I 011 v. Falvo, 122, S. Ct, 934, 534, .U.S. 426, 151 L. Ed. 2d 896.

Petitioner appeal to the 7th Circuit was briefed upon grounds that the 7th Circuit reverse and remand case back in District Court under Rule 59 (e) that authorizes relief when a moving party 'clearly establish (es) either a manifest error of law or fact' or 'present (s) newly discovered evidence. See: Souter v. International Union, 993, F 2d 595, 599 (7th Cir. 1993) (Quoting Federal Deposit Ins). The Court of Appeals has explained that there are only three valid grounds for a Rule 59 (e) motion-newly discovered evidence, an intervening change in law, and manifest error in law. Cosgrove v. Bartolotta 150 F .3d 729, 732, (7th Cir. 1998).

In this situation of law, the District Court error is grounds

under 59 (e), for misapprehend Petitioner claims, and misapplied the law to claims in light of the pertinent law. The District Court failed to record Petitioner's motion on the docket that was filed stamped on August 16, 2004, by the Court eighteen pages of material factual evidence that demonstrated a deprivation of Petitioner's 42 U.S.C. 1983 and material evidence that clearly established a violation of Petitioner's fourteenth due process protection.

The Lower Court erred for granting the Respondents' their motion for summary judgment under Rule 56 (e), on November 04, 2004, for not applying Petitioner's eighteen pages of factual material evidence that met the requirement to defeat a summary judgment pursuant to the Federal Rules of Civil Procedure Rule 56 (c).

The lower court Order on June 24, 2004, is of error, Petitioner was to have had a new trial date set if this case has survived the pending summary judgment. The District Court ruled on the Respondents motion for summary not until November 04, 2004. Also, the error of the lower of the court is that on November 02, 2004, the District Court Order set a telephonic status conference for Wednesday January 12, 2005, at 3:30 p.m. before the Magistrate Judge. The court stated that any party shall file any corrections or addition within ten days after receipt of this Order signed by the Magistrate Judge William Hussman Jr.

Petitioner believes this court should vacate their order on November 03, 2008. The lower court's error is erroneous and is inconsistence with the Federal law. The lower, court's decision contains material errors regarding applicable law, thus depriving Petitioner of a meaningful review of her case.

Finally, Petition respectfully asks this Court to grant

Rehearing upon the Respondents' violated Petitioner's Civil Right. Specifically, Petitioner claims that Respondents' actions were "deliberate, willful (sic) and continuing" and were conducted in their individual capacities while acting under color of State Law in a manner that seeks to deprive Petitioner of rights guaranteed by the Constitution of the United State and deprived thereof without due process of law". 42 USC 1983 read that every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privilege, or immunities secured by the Constitution and law, shall be liable to the parties injured in an action at law, suit in equity or other proper proceeding for redress.

Upon review of the record, there is sufficient evidence to raise a genuine issue of material fact as to whether the Respondents' in their individual capacities while acting under color of State Law violated Petitioner's civil right. Petitioner had a right to enjoy her life and liberty of her secured right, not have the Respondents' under false pretense fabricated over ten handwritten child abuse report that have Petitioner investigated by third parties the Child Protection Services and the Evansville Police Department.

The lower court Federal Error of Law deprived Petitioner of her Federal Right of Law of the Federal Rules of Civil Procedure Rule 56 to correct and cure defect that was in her complaint that would have met the requirement of the Federal Rules of Civil Procedure Rule 56 to had Trial set Demand by Jury.

III. REVIEW THE LOWER COURT'S FUNDAMENTAL ERROR OF LAW

This Court should also grant to rehear on grounds upon the fundamental error of the lower courts: First, the District court did not grant the Respondents' their motion for summary judgment for a frivolous complaint. The District Court ruled of error upon Rule 56 (e). The court was under law and could not sua sponte enter summary judgment without given Petitioner the opportunity to correct and cure defect in her complaint that would have allowed Petitioner to bring her complaint action brought under 42 USC 1983 Civil Rights deprivation and violation of Petitioners fourteenth due process protection.

Second, the lower court was authorized to provide by rule that party desiring oral argument on motion for summary judgment under Rule 56 must apply therefore, in absence of which oral argument will be deemed waived; however, the District Court could not rule or otherwise preclude party from requesting oral argument nor deny such request when made by party opposing motion unless motion is denied. On November 04, 2004, the District Court denied Petitioner of her motion for Oral Argument filed on August 2004, that was denied the right to argue that her complaint was defected and needed to be correct and cured that would have asserted over two hundred pages of factual genuine issue of material facts that demonstrated that the Respondents' in their individual capacities while acting under color of state law can be sued for depriving Petitioner of her secured 1983 Civil Right.

Third, the 7th Circuit failed to reverse and remand Petitioner's case back in District Court with instructions upon grounds of a manifest error of law.

The Federal Law provides that a motion filed in the Federal Court has a right to be ruled upon, not left off the record to be docket.

The 7th Circuit did not address this issue, so this Supreme Court must determine whether the record supports Petitioner's brief that the Respondents' in their individual capacities while acting under color of state law action resulted in a violation of Petitioner Civil Right.

CONCLUSION AND PRAYER

The lower court Federal Law of error Petitioner prays is grounds for this Supreme Court to grant this brief for Rehearing and vacate Order on November 03, 2008, that denies writ certiorari and grant writ certiorari.

Respectfully Submitted,

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CERTIFICATE OF PETITIONER

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and that is restricted to the grounds specifies in Supreme Court Rule 44.2.

Debra L. Thomas
DEBRA L.THOMAS